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**Thomas M. Zuckerman**  
P.O. Box 1804  
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September 26, 2011

John Laird, Secretary  
Natural Resources Agency  
1416 Ninth Street, Ste 1311  
Sacramento, CA 95814

Jerry Meral, Undersecretary  
Natural Resources Agency  
1416 Ninth Street, Ste 1311  
Sacramento, CA 95814

**RE: HMP v. PL84-99 Non-Project Levees in the Delta**

Gentlemen:

Undersecretary Meral will recall the discussions with Melinda Terry and myself at our July 20, 2011 meeting, at which Department of Water Resources Director Cowin was also present, about consistency determinations of PL84-99 Levee Standards with the Delta Plan being developed by the Delta Stewardship Council. I enclose a copy of the letter which I had previously addressed to Chairman Isenberg of the Delta Stewardship Council, copies of which were subsequently provided by Undersecretary Meral and Dale Hoffman Floerke of the DWR.

The subject matter addressed in the letter was later discussed at the Delta Stewardship Council meeting on August 26, 2011. Per the directions given by the Chairman of that meeting, I had a subsequent conversation with Joe Grindstaff, Executor Director of the DSC, in which we agreed upon appropriate language to be included in the next draft of the Delta Plan, to wit: "Efforts to obtain PL84-99 Levee Standards at a minimum shall be considered consistent with the Delta Plan unless lesser levels of levee protection have been established previously by the purchase of flood easements or similar binding commitments."

What prompts this letter are the comments upon the August draft of the Delta Protection Commission's Economic Sustainability Plan from the DWR that could undermine this agreed resolution and continue to subject efforts by levee districts in the Delta to improve their levees to Public Law 84-99 standards to consistency determination appeals before the Delta Stewardship Council. These specific comments are as follows and appear at page 13 of the DWR Comments in reference to page 39, paragraph 3, lines 3-7, of the August 9, 2011 Draft Economic Sustainability Plan: "While the text is reasonably correct when it states that in 1982 the Department and USACE agreed that the goal for Delta levees was the PL84-99 Levee Standard, the DWR has recently published its intent that the HMP

geometry is now supported for all Delta islands. Levee improvement beyond this geometric standard will require economic justification."

This statement of the DWR is presumably in reference to a document entitled "A Framework for Department of Water Resources Investments in Delta Integrated Flood Management dated February 14, 2011, Draft V3DHF and SMB.

The DWR submitted the Framework document to the Delta Stewardship Council without any discussion with your Delta Levees and Habitat Advisory Committee, or to the best of my knowledge, with any of the Delta "Stakeholders," including the private engineering companies and attorneys that advise the levee districts in the Delta. The document was distributed to the Levee Committee but without any invitation for comment.

The Framework document indicates that is supported by a Technical Memoranda that was in preliminary draft at the time and again had not been released for public comment.

Pursuant to a request from Delta Protection Commission's Executive Officer, a draft of the Technical Memoranda was made available informally for review (Staff Draft/Background Reference Memoranda, Delta Region, Integrated Flood Management, "Key Consideration and Statewide Implications," July 2011). This Technical Memoranda provides a generally excellent analysis of Delta levee issues, including an accurate description of origins and purposes of the HMP levee configuration.

The HMP levee configuration was never intended to be a standard for flood protection beyond a demonstration of State financial support to reduce the incidence of threatened or actual levee failures in which Federal financial assistance was sought. The Technical Memoranda does not provide support for the elevation of the HMP levee configuration as a flood protection standard for non-urban, non-project levees in the Delta.

PL84-99 is the Federal Delta specific flood control standard for non-urban, non-project levees. Thus, for example, when the Delta Protection Act of 1992 (Public Code Section 21080.22, et. seq.) was created when the Delta Protection Commission provides for improvement and ongoing maintenance of the levee system in the Delta (Section 29704), the coordinated maintenance is defined to include the rehabilitation and reconstruction of levees to meet applicable standards of the USACE.

Furthermore, as previously noted in my correspondence to the Delta Stewardship Council, CALFED similarly adopted the PL84-99 Levee protection standard for non-urban, non-project levees in the Delta.

This Delta specific Federal levee protection standard is roughly equivalent to the comparable State standard in Bull. 192-82 which in actual practice has been near the equivalent of PL84-99.

This standard has been adopted by virtually every levee maintenance district in the Delta dealing with non-urban, non-project levees. The HMP levee configuration is properly considered a minimum preliminary levee construction stage to reach PL84-99 standards and to provide assurance of FEMA assistance during declared flood emergencies.

Your Delta Levees & Habitat Advisory Committee, at its meeting last Friday, requested that its regularly scheduled November meeting to be held on November 14, 2011, be devoted to a discussion of this issue with active participation by the Resource Agency and the Department of Water Resources with specific reference to the comments of the DWR on the Draft ESP quoted above as well as to the Draft Framework document itself.

As pointed out in my earlier correspondence to the DSC, avoiding the necessity of consistency determination appeals before the DSC for levee district efforts to reach PL84-99 levee standards will avoid unnecessary delays which could jeopardize the entire levee improvement program in the Delta because of limited work windows and limits upon available financing.

This meeting with Resources and DWR will constitute the first opportunity for the Levee Committee to discuss the Framework document and its Technical Memoranda with its authors.

Thank you very much for your consideration.

Yours very truly,

*Thomas M. Zuckerman*  
THOMAS M. ZUCKERMAN

TMZ:csf

Enclosure

cc: Joe Grindstaff ✓  
Mike Machado  
Dante J. Nomellini, Sr.  
John Herrick  
Melinda Terry  
Chris Neudeck  
Gil Cosio  
Gil LaBrie

Dictated by the writer:  
Signed and mailed in writer's  
absence to avoid delay

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RECEIVED  
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July 6, 2011

Phil Isenberg, Chair  
Delta Stewardship Council  
980 Ninth Street, Ste 1500  
Sacramento, CA 95814

**RE: Are Efforts to Improve Delta Levees to PL 84-99 Standards  
Consistent With the Delta Plan?**

Dear Phil:

My effort to address this issue with the DSC at its meeting on Thursday, June 23, 2011, albeit somewhat clumsy, provoked a seemingly negative reaction, bordering upon hostility, from you and other commissioners and staff. This letter is an effort to state the problem more clearly and to reach a more reasoned conclusion than what emerged at Thursday's session.

The problem deals with the potential necessity of the Council's consistency review of efforts by Reclamation Districts to improve existing levees in the Delta to the U.S. Corps of Engineers' PL84-99 agricultural standard, a long-standing goal of virtually every Reclamation District in the Delta<sup>1</sup>, including those that have chosen to participate in the Delta Levees Subvention Program and the Special Projects Program. It is readily demonstrable that levee work accomplished to date under these programs has reduced incidents of catastrophic levee failure in the Delta dramatically. In fact, the only major failure of a Delta levee (other than those designed to "fail" under purchased flood easements) in the last dozen years (Jones Tract), occurred not because of high water.

<sup>1</sup> Indeed, the Reclamation Districts, as well as the State, are under a continuing obligation to maintain levees as a condition of the original swamp and overflow grants under the Arkansas Act of 1850 (9 U.S. Stats. At Large, p.519) from which titles were originally granted by the United States to California "to promote the speedy reclamation of the lands and thus invite to them population and settlement, thereby opening new fields for industry and increasing the general prosperity." See *Kimball v. Reclamation Fund Commissioners* (1873) 45 CAL. 394, 360.

Although it is abundantly clear that PL84-99 levees are appropriate and consistent with the Delta Plan, confusion arises with prospective designation of existing agricultural areas for wetlands habitat or other types of ecological or recreational use, for which either "no specific goal" or "HMP" levees are deemed "acceptable" in Table 7-1 at page 141 of the Fourth Staff Draft. An implication arises that continuing efforts by Reclamation Districts to achieve the PL 84-99 levee standards might be deemed "inconsistent" if lands protected by the District levee were designated or reserved for future wetlands habitat or other types of ecological or recreational use elsewhere in the Delta Plan, or a related plan (such as the BDCP) eventually incorporated in the Delta Plan. Current versions of the Delta Plan, the BDCP and other planning processes include broad and extensive indications of intent to so designate many thousands of acres of currently farmed Delta lands, without evidence of financial ability to acquire and/or convert such lands to such purposes. In addition, it is likely that most, if not all, such converted lands will require PL 84-99 (or better) levees to protect the substantial public investment in such projects, as well as to continue to protect adjacent lands from prospective inundation from wave wash, burrowing animals and other causes. And even further, it is foreseeable that restoring historic flow patterns in the Delta will restore ecological functions in Suisun Bay and Marsh that these conversions are meant to replace, increasing the likelihood that the conversions will never occur.

Although it is likely that consistency determinations will eventually be positive in such cases, delay is the enemy of progress in flood protection in the Delta. In a post-flood scenario, any significant delay in repair of a failed levee (such as might occur in a consistency determination) multiplies the damage and repair cost. In pre-flood conditions, Reclamation Districts are working with limited funds and available specialized equipment in very narrow work windows. Progress lost by missing an annual work window is never regained.

The solution to this dilemma is to make clear in the Delta Plan that work to achieve PL 84-99 Agricultural Standards levees in the Delta is consistent with the Plan, not requiring further review for that purpose. The avoided delay will be invaluable. This should have the additional salient effect of deferring inverse condemnation claims resulting

from findings in a consistency proceeding that levee construction to PL 84-99 standards is inconsistent with possible future wetlands or recreational uses.

Contrary to statement made by others during my presentation on the 23<sup>rd</sup>, this suggestion is not made to prevent orderly conversion of agricultural lands to wetlands or recreation usage once competent projects are determined, designed and funded, nor should it provide a rationale for no longer funding the Delta Levee Subventions and Special Projects Programs whose continued existence is essential to achieving the stated goals of environmental recovery, or more reliable water supply and preservation of the Delta.

Yours very truly,

A handwritten signature in black ink, appearing to be 'Tom' with a stylized flourish above it.

THOMAS M. ZUCKERMAN

TMZ:csf

cc: Joe Grindstaff